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650179—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1320

SAM MILLARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 60–64) is reported at 148 F. 2d 154.

JURISDICTION

The judgment of the circuit court of appeals was entered March 29, 1945 (R. 64), and a petition for rehearing (R. 65–67) was denied May 4, 1945 (R. 68). The petition for a writ of certiorari was filed May 28, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also, Rules XI and XIII of

the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The principal question presented is whether the information is bad on the grounds either that it fails to state any offense against the United States or that each count is duplicitous or indefinite and uncertain.

STATUTES AND REGULATIONS INVOLVED

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. III, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation,

or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. III, 901 *et seq.*, provides in pertinent part:

SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act. * * *.

* * * * *

SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.

* * * * *

SEC. 205. * * * (b) Any person who willfully violates any provision of section

> 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

Ration Order No. 1A (7 F. R. 9160), issued by the Office of Price Administration on November 6, 1942, pursuant to the authority of Section 2 (a) (2) and (8) of the Act of June 28, 1940, as amended (*supra*), provided in pertinent part as of the date of the offenses involved here:

> § 1315.801 [as amended, 8 F. R. 16246] *Prohibitions*—(a) *General prohibition.*—notwithstanding the terms of any contract, agreement or other obligation, regardless of when made, no person, unless permitted by Ration Order No. 1A, or by an order, authorization or regulation issued by the War Production Board, shall:
>
> (1) Make or offer to make, accept or offer to accept, or solicit a transfer of any tire or new tube.
>
> * * * * *

Revised Price Schedule No. 63, issued December 30, 1941 (7 F. R. 35), provided in pertinent part:

> SEC. 1315.101 [as amended, 8 F. R. 12335] *Prohibition against dealing in new rubber tires and tubes at prices above the maximum.*—On and after January 5, 1942, regardless of any contract, agreement, lease or other obligation, no person shall sell or deliver new rubber tires or tubes at

> retail prices higher than the maximum prices; * * *.

Maximum Price Regulation No. 528, issued April 20, 1944 (9 Fed. Reg. 4291), which superseded Revised Price Schedule No. 63 (*supra*), provides in part:

> SEC. 2. *Prohibition against dealing in tires and tubes, recapping and repairing at prices above the maximum.*—On and after [May 1, 1944] no person shall sell or deliver * * * any tire or tube * * * at a price higher than the maximum price fixed by this regulation, regardless of any contract or other obligation. * * *

STATEMENT

On August 30, 1944, an information in nineteen counts was filed against petitioner in the United States District Court for the Eastern District of Louisiana (R. 2–24). Counts 1 through 11 each charged that petitioner, a retail dealer in automobile and truck tires and tubes, wilfully transferred to a named person described tires or tubes without demanding or receiving from the transferee a certificate issued by a War Price and Rationing Board authorizing the transfer, as required by Ration Order IA, in violation of the Second War Powers Act (R. 2–15). Counts 12 through 19 each charged that he wilfully transferred to a named person described tires or tubes at prices in excess of those prescribed by Revised Price Schedule No. 63, in violation of the Emer-

gency Price Control Act of 1942 (R. 15–24).[1] At his jury trial, the Government dismissed counts 11, 14, 15, and 16 at the close of its case (R. 35), and petitioner rested without offering any evidence (R. 35). The jury returned a verdict of guilty on all the remaining counts except the first and twelfth (R. 36). Petitioner was sentenced to pay a fine of $200 on each count, "said defendant [to] be imprisoned until payment of said fines, or until said defendant is otherwise discharged as provided by law" (R. 44); to imprisonment for one year on counts 2 and 13, the sentence to commence "only at and from the termination of the commitment" in respect of the fines; and to consecutive terms of imprisonment for one year on count 3, counts 8, 9 and 10, counts 17, 18 and 19, and counts 4, 5, 6 and 7, making a total of five years (R. 44–45).

On appeal to the Circuit Court of Appeals for the Fifth Circuit, the court, to avoid indefiniteness as to when the first imprisonment sentence should begin to run, construed the judgment "as requiring the service of the first prison sentence to commence from the date on which the defendant is received at the penitentiary, reformatory or jail

[1] Revised Price Schedule No. 63 was superseded by Maximum Price Regulation No. 528 on May 1, 1944, and prior to trial counts 17, 18, and 19, which related to transactions after May 1, 1944, were amended to substitute the latter as the governing regulation (R. 30–32). So far as is here material the provisions of both regulations were the same. (See pp. 10–11, *infra*.)

for the service of his sentence" (R. 63–64), and otherwise affirmed the judgment (R. 64).

ARGUMENT

1. Petitioner does not challenge the sufficiency of the evidence to support the verdict of the jury, nor does he claim that any error was committed in the trial. Rather, his principal contention is that the information is bad on the somewhat inconsistent grounds that no offense is alleged and that each count is duplicitous. Additionally, he urges that the information is "vague, indefinite, and uncertain." (Pet. 8–13.) We believe that a mere reading of the information shows that these contentions are without merit.

As preliminary matters, the prosecuting attorney set forth in paragraph 1 of count 1 the various statutes, directives, and regulations relating to those counts charging violations of Ration Order 1A; paragraph 2 sets forth the provisions relating to those counts charging violations of the price orders. Then, in the charging part of count 1, it is alleged that on or about April 15, 1944, at New Orleans, petitioner, a retail dealer in tires and tubes, willfully did "sell, transfer, and deliver to one Louis Garner, one new Hood White Arrow Extra Service Four-Ply Automobile Tire Size 6.00 x 16, bearing Serial Number 5102503112–3," without having demanded or received a certificate issued by a War Price and Rationing Board authorizing such a transfer, as required by Ration

Order 1A, and without being otherwise permitted to do so by the ration order, in violation of Section 1315.801 of the order and Section 2 (a) (5) of the Priorities and Allocations Act, as amended by the Second War Powers Act (R. 2–4). The allegations in the other counts are substantially the same, with the exception that counts 12 through 19, instead of alleging violations of the ration order, charge that the tires described therein had been sold for prices in excess of the maxima fixed by the applicable price orders, in violation of the Emergency Price Control Act of 1942. Plainly, petitioner was fully advised of the charges against him, for the allegations are neither vague nor uncertain. Each count recites the date of the transaction, the description of the tires or tubes involved, the manner in which there was a failure to comply with the requirements of the applicable ration or price order, and the statute violated. It is difficult to perceive what further allegations could have been made to inform petitioner more fully of the offenses charged against him. Similarly, there can be no question that each count alleges an offense against the United States. It cannot be disputed that willfully to sell a new tire at a price in excess of the maximum fixed by a price order is a violation of the Emergency Price Control Act, and that willfully to sell a tire to a person not authorized to acquire one under the rationing regulations is a violation of the Second War Powers Act. That

each count clearly alleged one of these offenses is hardly debatable.

The sole basis for petitioner's argument that the counts are duplicitous is that each alleged that petitioner did willfully "sell, transfer, and deliver" a tire under circumstances proscribed by a specified order of the Price Administrator. In petitioner's view each of the quoted words describes a separate offense. It is clear, however, that the offense involved in each of the first 11 counts is a violation of the Second War Powers Act (*supra,* pp. 2–3) in that petitioner willfully performed an act prohibited by a regulation issued pursuant to that statute. A similar offense, proscribed by Section 205 (b) of the Emergency Price Control Act, is the crime described in each of counts 12 through 19. The words "sell," "transfer," and "deliver" do not describe different offenses; they merely designate the different means by which the offenses charged were committed. Thus, for example, Section 1315.801 of Ration Order 1A proscribes the "transfer" of a tire or tube in violation of the order, and Section 1315.201 (a) (35) defines "transfer" as "any change in right, title, interest, possession or control, including, but not limited to, sale, purchase, lease, loan, trade, exchange, gift, delivery, shipment, and hypothecation." As this Court said in *Crain* v. *United States,* 162 U. S. 625, 636:

> We perceive no sound reason why the doing of the prohibited thing, in each and

> all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute.

To the same effect, see *Blain* v. *United States*, 22 F. 2d 393 (C. C. A. 8); *Malaga* v. *United States*, 57 F. 2d 822, 825 (C. C. A. 1); *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269 (C. C. S. D. N. Y.).

2. Eight days before the trial commenced the Government, with leave of court (R. 30–32), amended counts 17, 18, and 19 to recite that Maximum Price Regulation No. 528, rather than Revised Price Schedule No. 63, was the governing regulation. This was occasioned by the fact that on May 1, 1944, the latter price schedule was superseded by the former and that counts 17, 18, and 19 related to transactions after May 1, 1944. Petitioner urges (Pet. 13–14) that this amendment made the information a new one and that he was therefore entitled to interpose *de novo* his demurrer and motion to quash which previously had been denied. We submit that the amendment was hardly one of such substance as to be regarded as a withdrawal of the earlier information and the filing of a new one, thereby commencing the entire proceeding anew. But even if that be assumed, we are unable to understand how petitioner would have been prejudiced by the

trial court's failure to permit him to reassert a challenge to the information which previously had been fully considered and rejected (See R. 25–27, 29–30, 38–40). Obviously, the substitution of the words "Maximum Price Regulation No. 528" for "Revised Price Schedule Number 63" did not change in any respect the considerations involved in the court's earlier denial of the demurrer and motion to quash. At best, to have permitted petitioner to reassert his challenge would have been to permit him to do a useless act. In such a situation, the trial court plainly is not chargeable with an abuse of discretion.

3. Finally, petitioner urges (Pet. 14), without supporting argument, that the Emergency Price Control Act and the Second War Powers Act are unconstitutional on the ground that they delegate legislative power, that they are in violation of the Fourth and Fifth Amendments, that they are unconstitutional attempts to regulate intrastate commerce, and that they are improper exercises of the war power (see R. 40–41). Petitioner does not elucidate the grounds upon which he predicates these conclusions. We believe that the contention is without merit in view of the decisions in *Yakus* v. *United States,* 321 U. S. 414, and *Bowles* v. *Willingham,* 321 U. S. 503. Cf. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398. See also, e. g., *Taylor* v. *United States,* 142 F. 2d 808 (C. C. A. 9); *O'Neal* v. *United States,* 140 F. 2d 908 (C. C. A. 6), certiorari denied, 322 U. S. 729;

Taylor v. *Brown*, 137 F. 2d 654 (Em. Ct. App.), certiorari denied, 320 U. S. 787; *Brown* v. *Wright*, 137 F. 2d 484 (C. C. A. 4); *Brown* v. *Warner Holding Co.*, 50 F. Supp. 593 (D. Minn.).[2]

CONCLUSION

The decision below is correct. The case presents no conflict of decisions or unsettled question of importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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JUNE 1945.

[2] Petitioner suggests (Pet. 13) doubt as to the validity of Revised Price Schedule No. 63, because it was promulgated December 21, 1941, prior to the enactment of the Emergency Price Control Act of 1942. Section 206 of the Act expressly provides, however, that "Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2." The price ceiling violation alleged in count 13, the only one of the counts based on Regulation 63 upon which petitioner was convicted (see pp. 5–6, 10, *supra*), occurred after the enactment of the Emergency Price Control Act of 1942 (R. 15–20).

U. S. GOVERNMENT PRINTING OFFICE: 1945